

Compliance Protocol

Between

BC Hydro

The Department of Fisheries and Oceans

British Columbia Ministry of Environment

March 8, 2006



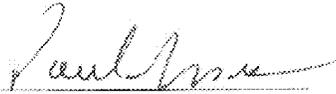
Fisheries and Oceans
Canada

Fishes et Océans
Canada



1. PARTIES TO THE PROTOCOL

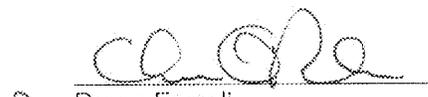
We, the undersigned, support and endorse the contents of this Protocol



Paul Sprout
Regional Director General, Department of Fisheries and Oceans



Chris Trumpy
Deputy Minister, Ministry of Environment



for Dawn Farrell
Executive Vice President, Generation and Engineering, BC Hydro

2. Preamble

This Compliance Protocol has been developed to support the initiatives directed at enhancing corporate compatibility among the Department of Fisheries and Oceans (DFO), the Ministry of Environment (MOE), and BC Hydro (BCH).

The parties are committed to conserving, enhancing, and protecting the fisheries resource, fish habitats and the aquatic environment as per the 1999 *Agreement on Inter-jurisdictional Cooperation with Respect to Fisheries and Aquaculture* and the principles of the *Canada – British Columbia Fish Habitat Management Agreement (2000)*.

The parties also recognize BC Hydro's statutory obligation to provide electricity and the importance of the hydro electric resources in fulfilling that core responsibility.

3. Purpose

This Compliance Protocol is designed to achieve the following goals:

- a) facilitate communications between the parties;
- b) encourage the expedient resolution of issues to prevent violations of the *Fisheries Act*;
- c) ensure operations related to hydro-electric facilities are in compliance with the appropriate regulatory authorizations and agreements designed to manage impacts upon fish and fish habitats.

4. Governance Structure

A governance structure to support these initiatives consisting of a senior level *Fish Wildlife Hydro Policy Committee* and staff level *Fish Hydro Management Committee* has been developed to oversee hydro/fish issues and provide ongoing administrative and technical input.

The Policy Committee (DFO Regional Director, Oceans, Habitat and Enhancement Branch, MOE ADM of Environmental Stewardship Biodiversity and, BC Hydro Director, Safety, Environment and Social Issues) was established to provide strategic direction and meets twice per year as a minimum.

The Management Committee meets quarterly, or as needed, to discuss operational issues, resolve disputes when required and make recommendations to the Policy Committee. Meetings are to be structured to ensure the maintenance of ongoing dialogue between the parties.

This Compliance Protocol applies to the parties with respect to compliance and enforcement related to the provisions of the *Fisheries Act* (Canada) within British Columbia.

5. Statements of Intent

BC Hydro is committed to ensuring that its hydro-electric facilities operate in compliance with the provisions of the *Fisheries Act*.

This Protocol is not intended to restrict DFO or MOE from delivering upon the goals of the *Policy for the Management of Fish Habitat (1986)*, other operational policies, or their regulatory responsibilities for the administration and enforcement of the *Fisheries Act* and is not intended to fetter the authority of a statutory decision maker.

The Parties agree to work closely in a spirit of cooperation to develop effective working relationships to facilitate fulfillment of their respective mandates.

The Parties agree to take the steps necessary, within their respective organizations, to uphold the intent and spirit of this Protocol.

The Parties agree that in due course they will review and discuss with British Columbia Transmission Corporation whether the Compliance Protocol will be revised to extend to ongoing maintenance activities related to transmission lines undertaken by British Columbia Transmission Corporation.

6. Principles

The key principles that guide this protocol are:

- a) All parties have a role in ensuring compliance with the provisions of the *Fisheries Act* and regulations;
- b) The parties agree to share compliance and monitoring information in a transparent manner;

- c) All parties recognize the importance of achieving respective organizational goals in a mutually supportive manner;
- d) Issues raised by any of the parties will be dealt with in a timely fashion;
- e) This protocol is to be interpreted to not conflict with or derogate from federal or provincial statutes, and to be subject to them. If any provision of this protocol conflicts with or derogates from any federal or provincial statute, the provision is without effect.
- f) Nothing in this Protocol can abrogate or derogate from any Aboriginal, treaty or other rights of Aboriginal People including self-government agreements.
- g) BC Hydro acknowledges and agrees that:
 - i) its involvement with this Compliance Protocol and the voluntary submission of information under it does not preclude subsequent legal investigation with respect to any matter in the event of a finding that BC Hydro has failed to comply with any of the requirements of its *Fisheries Act* authorizations or any of the requirements of its water licence terms and conditions; and
 - ii) if a legal investigation is undertaken and it leads to a decision on the part of DFO/MOE to pursue enforcement action against BC Hydro arising from BC Hydro's failure to comply with any of the requirements of its *Fisheries Act* authorizations or any of the requirements of its water licence terms and conditions, BC Hydro will not rely on, and hereby waives, any rights it may have under the *Charter of Rights and Freedoms* to challenge the use of any information provided by it under the Compliance Protocol or voluntarily in the legal investigation in that enforcement action.

7. Communication

All public communications pertaining to aspects of this Compliance Protocol plus incidents subject thereto, are to be agreed upon by the parties prior to release.

8. Issue Resolution

With the exception of matters arising from legal investigations, the parties agree that any issue, matter of general concern or dispute arising from this Compliance Protocol is to be dealt with by the two levels of Committees representing the three parties outlined in the Governance Structure.

The following process will be followed where agreement cannot be reached:

The Fish Hydro Management Committee will summarize the issue identifying the point(s) of disagreement and forward the summary to the Fish Wildlife Hydro Policy Committee for resolution;

Within a mutually agreed upon timeframe of receiving the issue summary, the Fish Wildlife Hydro Policy Committee will convene a meeting to resolve the issue.

9. Activity Specific Procedures

The parties agree that activity or operation specific compliance and enforcement procedures may be developed and approved by the Fish Wildlife Hydro Policy Committee on an as-needed basis. Annex 1, Water Use Plans – Incident Response Procedure, is attached hereto and forms a part of this Compliance Protocol.

In addition to Annex 1, additional procedures, once approved by the Fish Wildlife Hydro Policy Committee, may be annexed to this agreement and be subject to the provisions contained in this Protocol.

10. Term of Agreement

Subject to the provisions of Section 11, unless renewed for another fixed term by mutual written consent of both parties, this Compliance Protocol will terminate on March 31, 2016.

The parties are committed to an annual review and reporting on the implementation of this Compliance Protocol.

This Compliance Protocol may be amended by written agreement duly executed by the parties.

11. Termination of Compliance Protocol

If, at any time, DFO, MOE or BC Hydro wishes to terminate this Compliance Protocol, it shall inform the other agencies in writing 60 days prior to the effective date of termination. Requests for termination shall be substantiated with appropriate rationale and documentation.

It is understood by the parties, that termination of this Compliance Protocol, does not release any of the parties from obligations mandated by federal and/or provincial legislation and regulations.

12. Applicability to the Water Act

This Compliance Protocol and the mechanisms under it do not extend to issues related to or arising from enforcement of the *Water Act*. The *Water Act*, its regulations, related policies and regulatory requirements, including licence terms and conditions, continue to apply without change.

The Parties agree that, in due course, they will review whether the Compliance Protocol should be amended to extend it to *Water Act* compliance and enforcement, particularly in relation to Annex 1, Water Use Plans – Incident Response Procedure

Annex 1 - Water Use Plans – Incident Response Procedure

This Procedure has been developed to ensure open communication and ongoing dialogue, with respect to perceived and actual compliance issues during the implementation and operation of the Water Use Plans (WUP) for BC Hydro facilities. Under this Procedure, the Department of Fisheries and Oceans (DFO), the Ministry of Environment (MOE), and BC Hydro (BCH) are committed to ongoing dialogue to facilitate the resolution of any potential issue.

The governance structure, including the Terms of Reference for the Fish Hydro Management Committee will ensure ongoing administration and technical input to dispute resolution. The Terms of Reference for the Fish Wildlife Hydro Policy Committee ensures a senior level, final dispute resolution mechanism, including issues respecting DFO's, BCH's or MOE's adherence to this Procedure.

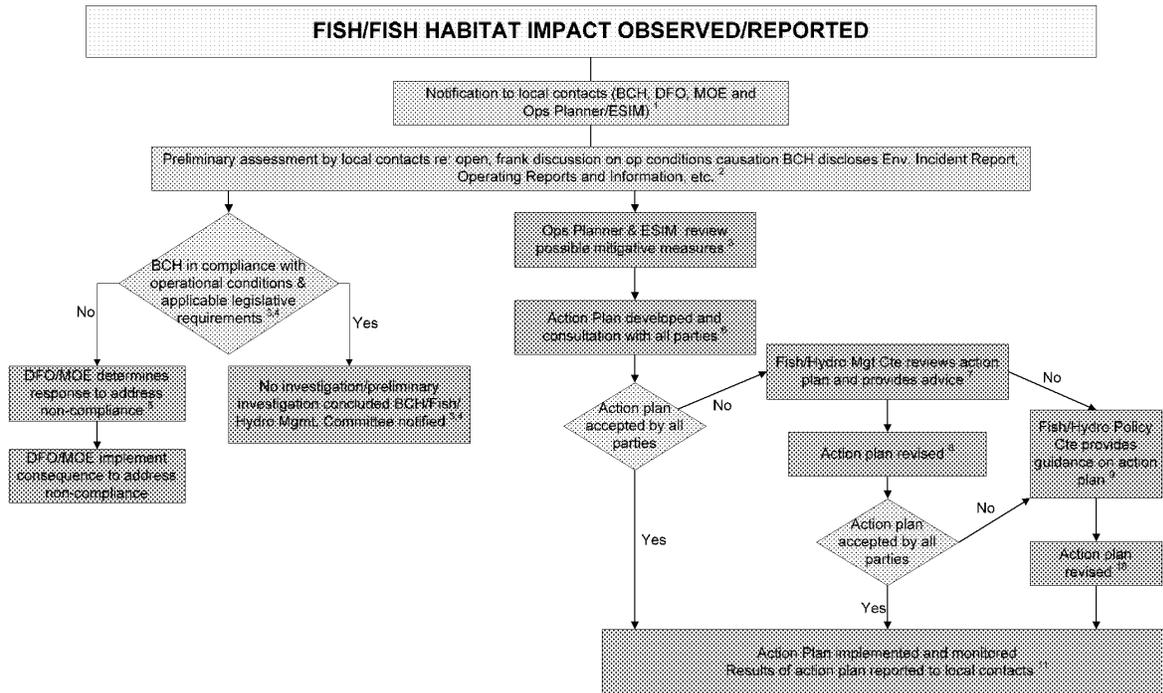
Purpose:

The parties recognize that impacts upon fish and fish habitat may occur as a result of BCH operating in compliance with the terms and conditions of water license requirements (WUP operating parameters) and *Fisheries Act* authorizations. The purpose of this Procedure is to:

- Ensure the parties are informed in a timely fashion of any impacts or potential impacts upon fish and fish habitat resulting from the operation of the hydro generation facility;
- Share information regarding the operation of the hydro generation facility with the regulatory agencies to facilitate informed decision-making;
- Share information on progress or discontinuance of investigations;
- Provide a process to determine the status of BCH's compliance with the conditions of Water Use Plans; and
- Provide a process to guide the implementation of mitigative measures to reduce impacts upon fish and fish habitat where appropriate.

A) Incident Response Procedure Roadmap

The following flow diagram and associated footnotes outline the actions and responsibilities the parties have committed to under this Procedure:



1. The local contact (as identified in the applicable BC Hydro Generation Operating Order Contact List) observing or receiving a report of fish or fish habitat impacts is responsible for contacting the corresponding local contacts of the other agencies as soon as practicable. Each local contact is responsible for contacting their respective organization's contacts. (Refer to contact lists for local contacts). BCH will implement measures to correct any unforeseen events, mechanical failures, etc.
2. A preliminary assessment by one or more of the local contacts, as agreed to by the local contacts of BC Hydro (BCH), DFO and MOE, will be undertaken within twenty-four hours or such time frame as may be otherwise agreed. The preliminary assessment is the opportunity to have open, frank discussions regarding the cause of the event, compliance with operational requirements and possible solutions that may include corrective action e.g. adjusting the operation, and/or mitigative measures e.g. fish salvage.

BCH will provide records regarding the incident including the Environmental Incident Report, Operating Records and information as available (subject to applicable legal restrictions including those under the Freedom of Information and Protection of Privacy Act) and any other reports required by the Water Comptroller. DFO/MOE will provide information regarding the incident, including potential impacts on fish and fish habitat. The records will be provided at the preliminary assessment or as available subsequent to the preliminary assessment meeting. Nothing in this agreement precludes DFO and MOE from commencing a preliminary investigation to protect the integrity of any physical evidence that may be lost due to the passage of time.

3. Within five days of the original notification, or a time frame agreed to by all parties, BCH (Operations Planner and Environment and Social Issue Manager) will review the preliminary assessment and notify the local contacts as to the status of compliance with all Acts, regulations, licenses, permits and authorizations based upon but not limited to:

observed impacts, water license requirements (WUP operating parameters), Fisheries Act authorization requirements, Treaty and Treaty related requirements (collectively, "regulatory requirements"), and area maintenance/environmental program requirements. If DFO/MOE, having reviewed the agreed upon documentation are satisfied BC Hydro was in compliance with all the applicable regulatory requirements, DFO/MOE will not commence a legal investigation, or alternatively, if a legal investigation was initiated, will conclude the legal investigation at that point. BCH shall be notified accordingly. If BCH's operation was not in compliance with applicable regulatory requirements, DFO/MOE will determine an appropriate response based upon existing applicable legislation, policy and procedures.

4. If DFO/MOE conclude that there is a disagreement between BCH and themselves regarding compliance, a third party, acceptable to all parties may be employed as an independent auditor to review the available records and information and make an assessment of BCH's compliance with operational conditions and legislative requirements. (The auditor shall not disclose the available records and information to any third party without BCH's consent.) BCH is responsible for the costs related to the audit. Unless agreed otherwise between the parties, the auditor shall be retained and shall report his assessment within 14 days of the agreement between the parties to retain an auditor. "The audit report will be shared between the parties to enable a full understanding of the reasons for disagreement and the assessment of compliance".

While the auditor's assessment shall not be binding, the parties shall give it due and serious consideration in determination of BC Hydro's compliance. If an investigation continues or is initiated, BCH agrees that the findings in the audit report can be used to support the investigation and any subsequent enforcement actions arising from a finding of non-compliance. If subsequent to the audit, DFO/MOE agree BCH was in compliance with all applicable regulatory requirements, DFO/MOE will not commence a legal investigation, or alternatively, if a legal investigation was initiated, will conclude the legal investigation at that point. BCH shall be notified accordingly.

5. If a legal investigation is to be undertaken, DFO and MOE will determine lead agency roles and investigative protocols based upon existing protocols and MOUs between the parties.

If an investigation is to be undertaken, the lead agency will notify BCH (Operations Planner and Environment and Social Issues Specialist) of the decision to undertake an investigation, except where doing so would compromise the investigation, and will be responsible for establishing a communications protocol between the parties with respect to communications with any other interested groups or individuals, e.g., media, in accordance with section 6 of the Compliance Protocol.

6. The Operations Planner and Environment and Social Issues Specialist review the need for corrective action and/or mitigative measures (for the purposes of the flow chart, an action plan includes no action on the part of BCH). BCH will develop an action plan and communicate the action plan in writing to the local contacts. Any action plans requiring corrective action and/or mitigative measures will establish timelines for implementation and monitoring protocols.
7. If an action plan is not agreed to by all parties, the disagreeing party(ies) will notify their Fish Hydro Management Committee representative. The Fish Hydro Management

Committee representative is responsible to raise the issue with the Fish Hydro Management Committee. The Fish Hydro Management Committee will review the issue and provide advice to the local contacts on the development of the action plan. If developing an action plan that could have impacts upon resource values other than fish and/or fish habitat, all parties agree that they will consider, and consult where necessary with other interested parties to address any concerns or potential conflicts with other resource values identified in the WUP process.

8. The local contacts, BC Hydro Operations Manager and Environment and Social Issues Specialist are responsible for revising the action plan based upon advice received from the Fish Hydro Management Committee. If the action plan still cannot be agreed to, the Fish Hydro Management Committee will be asked to seek guidance from the Fish Hydro Policy Committee.
9. If there is no agreement at the Fish Hydro Management Committee regarding the action plan, the issue will be forwarded to the Fish Hydro Policy Committee for guidance.
10. The local contacts, BC Hydro Operations Manager and Environment and Social Issues Specialist are responsible for revising the action plan based upon advice received from the Fish Hydro Policy Committee.
11. The Action Plan is implemented and monitored. The outcome(s) of the Action Plan are to be reported to the local contacts and the Fish Hydro Management Committee by BCH.

B) Role of the Fish Hydro Management Committee regarding the Incident Response Roadmap

The Fish Hydro Management Committee representatives are responsible for the following:

- **Process review:**

The Fish Hydro Management Committee has the responsibility of undertaking a review of the process, (steps 1 through 11) as described in the Incident Response Roadmap.

- **Dispute Resolution:**

The Fish Hydro Committee Terms of Reference assigns the task of building on existing partnerships and relationships to provide a solutions-oriented forum to resolve issues and to facilitate and improve communications at all levels within the organizations.

For the purposes of this procedure the issue resolution mechanism for addressing general concerns or disputes identified in the Compliance Protocol apply with the exception where the dispute is in relation to compliance assessments and the exercising of lawful rights.

The specific components of the dispute resolution roles will include the following:

- Provision of advice and guidance to local contacts to assist in resolving disputes arising from implementation of the Incident Response Procedure;
- Reviewing the outcomes from the implementation of an action plan and giving consideration to longer term WUP implications.